BLT Enterprises of Sacramento, Inc., d/b/a Sacramento Recycling and Transfer Station *and* Chauffeurs, Teamsters and Helpers Local Union No. 150, International Brotherhood of Teamsters, AFL–CIO.[1] Cases 20–CA–30455–1, 20–CA–30455–4, 20–CA–30455–5, and 20–CA–30455–6

August 27, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

Administrative Law Judge Jay R. Pollack issued the attached decision on January 31, 2003. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] as modified below and to adopt the recommended Order as modified.

The judge found that, several weeks after the Union filed a petition seeking to represent the Respondent's truckdrivers, Shawn Guttersen, the Respondent's vice president, asked employee Gary Wickey why the drivers wanted a union and what it would take to make the drivers happy. The complaint alleged this matter as a violation of Section 8(a)(1) of the Act. The judge did not make a finding on this allegation. The General Counsel excepts, contending that the judge should have found a violation. We find merit in this exception.

Guttersen's inquiry, in the context of the union campaign, constituted an unlawful solicitation of grievances and implicit promise to remedy them.[4] See, e.g., *S. E. Nichols, Inc.*, 284 NLRB 556 (1987), enfd. in relevant part 862 F.2d 952 (2d Cir. 1988), cert. denied, 490 U.S. 1108 (1989). We find that, by this inquiry, the Respondent violated Section 8(a)(l).[5]

The judge also found that, on December 4, 2001, the Respondent held meetings with its drivers to discuss the upcoming representation election. Guttersen told employees that the Respondent wanted to give the drivers a raise but could not do so because the Union had filed a

[1] We have amended the caption to reflect the disaffiliation of the International Brotherhood of Teamsters from the AFL–CIO effective July 25, 2005.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] There are no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by: denying an employee the right to representation at an interview which the employee reasonably believed might result in disciplinary action; interrogating employees about their union activities and the union activities of other employees; threatening employees with subcontracting, loss of work assignments, and loss of employment; announcing and granting wage increases and a bonus program; and, by imposing restrictions on the rights of employees to discuss unions or other protected concerted activities.

We affirm pro forma, in the absence of timely exceptions, the first-mentioned violation found by the judge. Had there been timely exceptions, we would have reversed the judge and dismissed the allegation, retroactively applying *IBM Corp.*, 341 NLRB No. 148 (2004), where a Board majority reversed *Epilepsy Foundation*, 331 NLRB 676 (2000), enfd. in part 268 F.3d 1095 (D.C. Cir. 2001), and held that employees in a nonunionized workplace do *not* have a right to representation at a disciplinary interview. While we affirm the finding of a violation pro forma, we decline to order a remedy. Under *Epilepsy Foundation*, the only remedy for a denial of a request for the presence of a witness at a disciplinary investigation would be an order to cease and desist from such conduct in the future. Because *IBM* now permits such denials, it would be futile to order the Respondent to cease and desist from doing what it is now permitted to do. This approach is consistent with the Board's authority to consider remedial issues sua sponte. See, e.g., *Indian Hills Care Center*, 321 NLRB 144 fn. 3 (1996).

In the circumstances here, Member Schaumber would not adopt the judge's finding of a violation.

[4] In light of the judge's uncontested finding that the Respondent, through dispatcher Chenoweth, unlawfully interrogated employees, we find it unnecessary to pass on the complaint allegation that Guttersen's inquiry constituted an unlawful interrogation. To find a violation on this allegation would be cumulative and would not affect the remedy.

[5] We therefore find it unnecessary to pass on the allegations that Guttersen on another occasion unlawfully told employees he had an "open door" and that the Respondent's President Bernie Hubberman unlawfully asked an employee why the Respondent's drivers were unhappy. Findings that these incidents also involved violations of Sec. 8(a)(1) would be cumulative and would not affect the remedy. Similarly, in light of the judge's finding that the Respondent unlawfully interrogated employees about their union activities and the union activities of other employees, we find it unnecessary to pass on the allegation that Mary Lou Nuno, the Respondent's human resources and safety manager, unlawfully interrogated employee Gary Wickey.

The complaint alleged that Supervisor Gilbert Pineda, after delivering a check to employee Wickey, who had previously asked Vice President Guttersen about wages owed Wickey by the Respondent's predecessor, told Wickey that there would probably be more checks for Wickey if he voted against the Union. Pineda denied making that statement. The General Counsel correctly points out that the judge did not make a finding as to whether Pineda actually made the statement at issue. We need not resolve the credibility issue. Even if the statement was made, and even if it was a promise to remedy a grievance by paying employees additional paychecks to cover amounts owed to them by their previous employer, we note that Guttersen, on another occasion, made an unlawful promise to remedy grievances when he asked Wickey why the drivers wanted a union and what it would take to make them happy. Accordingly, another finding of violation would be cumulative.

petition. At another meeting with employees, on December 10, Guttersen again said that the Respondent could not grant a raise because of the petition. He said that the Respondent had considered granting a raise but could not do so because it would be considered a bribe to defeat the Union.

The complaint alleged these two incidents as violations of Section 8(a)(1). The judge did not make findings on these allegations. The General Counsel excepts, arguing that the judge should have found the violations alleged. We find merit in these exceptions.

The Respondent, through Guttersen, attributed the withholding of the raise to the petition, thus unlawfully placing the onus for the denial of these benefits on the Union. See, e.g., *Marshall Durbin Poultry Co.*, 310 NLRB 68 fn. 2 (1993). In doing so, the Respondent violated Section 8(a)(1).[6]

We do not, however, find merit in the General Counsel's contentions that other additional violations of Section 8(a)(1) should be found. Thus, the General Counsel maintains that the Respondent's transportation manager, Steve Albin, violated Section 8(a)(1) by telling employees on November 8 that there would not be any more discharges (the Respondent discharged five drivers on November 7) unless someone "pissed him off." The General Counsel submits that this statement constituted an unlawful implicit threat to discharge prounion employees. However, we have affirmed the judge's findings that the Respondent was unaware of its employees' union activities until November 16, and that the November 7 discharges were lawful. In these circumstances, we do not find Albin's statement violative of Section 8(a)(1). For the same reasons, we also find lawful Guttersen's November 8 statement that the Respondent knew the employees were unhappy with their pay rates and that the Respondent might be able to increase them. Accordingly, we dismiss the allegations pertaining to the November 8 statements by Albin and Guttersen.

We also dismiss the allegation that Guttersen's early December statement to Wickey, "I understand you are one of the guys that were involved in starting the Union," unlawfully created an impression of surveillance. There is no evidence to support the proposition that Wickey would reasonably infer from this statement that the Respondent was spying on him. To the contrary, by the time this incident occurred, the Respondent had learned of a confrontation between Wickey and another employee that arose in part from Wickey's strong support for the Union. In these circumstances, we conclude that Guttersen's statement to Wickey would not reasonably have caused the latter to believe that his union activities were under surveillance.[7]

Nor do we find merit in the General Counsel's contention that the Respondent threatened employees with discharge in a December 17, 2001 letter. In that letter, distributed shortly before the December 21 election, the Respondent, referring to its predecessor, Waste Transport Company, stated in part:

> [Waste Transport] failed and is out of business because it did not maintain efficient schedules and utilize its equipment efficiently. The drivers who left our employment are the ones who refused to cooperate in making this an efficient operation. We believe that those drivers who remain, our current Class A drivers, understand the reasonable business needs for schedules and efficiency in utilization of equipment. We are sure that no one wants [Respondent] to fail and have to lay off employees as did [Waste Transport]. All [Waste Transport] drivers that completed our orientation and pre-hire process were offered driving positions with Sacramento Recycling.

The General Counsel, placing particular emphasis on the reference to drivers who "refused to cooperate," argues that the letter contained an unlawful implied threat of discharge. We do not agree. As noted above, we have affirmed the judge's finding that the November 7 discharges were lawful. Thus, we decline to interpret the references to drivers who "refused to cooperate" as code for prounion drivers. We also note the judge's finding that, unrelated to any union considerations, the Respondent was attempting to improve on the inefficient operations of Waste Transport. We therefore conclude that the letter did not contain an unlawful implied threat of discharge, and we dismiss this allegation.

We affirm the judge's conclusion that the General Counsel did not establish 8(a)(3) violations with respect to the five employees discharged on November 7. In this regard, the judge found, and we agree, that the General Counsel failed to establish the requisite knowledge on

[6] Chairman Battista finds those statements to be truthful and lawful expressions of the Respondent's concern about the potential consequences of granting a raise. Indeed, the Respondent has been found to have violated the Act by ultimately doing so. Inasmuch as the grant of the wage increase was unlawful, Chairman Battista would not find that the Respondent's expressed and correct concern that this would be so was unlawful.

[7] Similarly, we dismiss the allegation that dispatcher Walt Chenoweth unlawfully told employee James Gowan that he knew Gowan had been one of the employees who started the organizing effort, as well as the allegation that Chenoweth unlawfully told employee Wickey that management believed Wickey and Gowan had started the Union. In all of these instances, by the time the allegedly unlawful statements were made, knowledge of union activity was common and pervasive.

the Respondent's part. Accordingly, the judge dismissed the allegation that the Respondent unlawfully discharged five truckdrivers. We agree with the judge. We disagree with our colleague.

The Respondent took over the operation from the predecessor on September 24. We assume arguendo that the Respondent knew of efforts to unionize the predecessor employer. However, the only employees as to whom there was specific knowledge were employees Doremus and Edwards.

Respondent was not aware that unionization efforts continued after the takeover from the predecessor. Nor is there a showing that the Respondent was aware of employee discussions, after the takeover, about working conditions. And, even if the Respondent was so aware, such discussions are not the same thing as efforts to unionize. Indeed, employees did not meet with the Union until November 4, and did not sign cards until November 5 and 6. There is a lack of any direct evidence that the Respondent knew that the employees met with the Union on November 4, that authorization cards were distributed on November 5 and 6 by several drivers (none of whom was discharged), that one of those drivers spoke to six other employees about the Union on November 6, or that at least six or seven employees (only one of whom was discharged) signed cards.

It was the General Counsel's burden to establish the requisite knowledge on the Respondent's part, not the Respondent's burden to establish lack of knowledge. The judge evaluated the surrounding circumstances and concluded that, on the record before him, the General Counsel had not met the burden. This conclusion was correct, and we affirm it.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, BLT Enterprises of Sacramento, Inc., d/b/a Sacramento Recycling and Transfer Station, Sacramento, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(e) and reletter the subsequent paragraph as paragraph 1(g).

"(e) Soliciting grievances, or promising to remedy them, in order to discourage union membership or support."

2. Insert the following as paragraph 1(f).

"(f) Telling employees that it cannot increase wages or other benefits, because of union activity, in order to discourage union membership or support."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. August 27, 2005

_____

Robert J. Battista, Chairman

_____

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

The record here easily supports the inference that the Respondent knew about the union activities of the five employees it discharged—promptly after employees distributed and signed union authorization cards at work. Contrary to the judge and the majority, I would find that the General Counsel established the Respondent's knowledge, as well as the other elements of his initial burden of proof under *Wright Line*.[1] But because the judge failed to make findings with respect to the Respondent's assertedly lawful reasons for the discharges, its *Wright Line* defense, I would remand the case.

I.

On September 24, 2001, the Respondent took over operation of the trash hauling component of its trash recycling business, replacing a subcontractor at the jobsite. When it did so, the Respondent was well aware that the trash hauling employees recently had discussed unionization while employed by the subcontractor. Thus, as early as July 2001, employee Tammie Edwards told the Respondent's General Manager Jeff Donlevy that employees were talking with a union representative. Additionally, employee Ted Doremus told Donlevy that employees needed a union. In mid-September, Edwards told Transportation Manager Steve Albin that employees had been talking to a union. After the Respondent took over the trash hauling operation, employees continued to discuss, among themselves, working conditions at the facility. They did so in the truck yard, at the landfills, at a staging area, on CB radios, and in the drivers' room adjacent to the dispatch office used by supervisors. All of this discussion—between employees and the Respondent's managers and among employees with one another at the jobsite—culminated on November 5 and 6 when employees distributed and signed union authorization cards at the jobsite.

The next day, November 7, the Respondent discharged five employees, including Doremus. The discharged employees were not given specific reasons for the disci-

[1] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *Transportation Management Corp. v. NLRB*, 462 U.S. 393 (1983).

pline, other than that they "didn't fit in." On November 8, Transportation Manager Albin told assembled employees that there would be no more discharges—that is, unless somebody "pissed him off." Thereafter, the Respondent, among other things, unlawfully threatened employees with loss of work assignments and employment because of their union activities, imposed restrictions on their right to discuss unionization, granted wage increases and a bonus program, interrogated employees about their union activities, and solicited grievances and promised to remedy them to discourage unionization.

II.

The judge found that when employees told high level management officials that they had been talking to a union and needed a union, this was nothing more than "vague talk." The majority affirms that finding and adopts the judge's conclusion that the Respondent lacked knowledge of employees' union activities and sentiments. I disagree. When employees tell their general manager that employees are talking with a union representative, this is likely to be perceived by management as an indication that employees are, indeed, talking with a union representative. This perception is likely to be bolstered when, some time later, the transportation manager is told the same thing. There is nothing "vague" about this. It is quite specific and direct.

True, these comments to the Respondent's high management officials were made before it took over the trash hauling operation. But, as the judge found, employees continued to complain openly to each other about working conditions after the takeover. More important, the Respondent had no reason to believe that anything of consequence had changed or that its employees were suddenly content. Thus, what the Respondent was told from July to September about unionization presumably still was true in November: that employees felt they needed a union and were talking with union representatives.

To find an absence of knowledge, the majority must infer: (1) that management officials ignored what they were told about unionization; (2) that management presumed that things had changed when it took over the trash hauling operation, even though employees were talking and complaining about working conditions all over the jobsite, including in the drivers' room located adjacent to a supervisory office, and (3) that—notwithstanding the commission of numerous unfair labor practices designed to thwart unionization—the timing of the discharges 1 day after the on-site distribution of union authorization cards tells us nothing about the Respondent's knowledge of unionization efforts among employees.

Contrary to the majority, I would find in these circumstances that the Respondent had knowledge of employees' union activities and sentiments. See generally *D & F Industries*, 339 NLRB 618, 622 (2003) (describing circumstances in which Board infers knowledge of employee's union activities). I would also find that there were actual union activities, animus against employees' union sentiments and activities, and contemporaneous timing between these activities and the alleged unlawful discharges.

Unfortunately, however, the judge gave short shrift to the Respondent's defenses pertaining to the specific reasons for each of the five discharges alleged to be unlawful, in light of his incorrect finding that the Respondent did not have knowledge of union activities. Accordingly, I would remand this proceeding to the judge for consideration of the Respondent's defenses.[2]

Dated, Washington, D.C. August 27, 2005

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate employees about their union activities or the union activities of other employees.

WE WILL NOT threaten subcontracting of our trash hauling operation, loss of work assignments, or loss of

[2] Contrary to the majority, I would not presently consider, in the absence of a remand, those 8(a)(1) allegations dismissed by my colleagues that are factually related to the 8(a)(3) discharge allegations. I would find, however, that the Respondent violated Sec. 8(a)(1) by unlawfully soliciting grievances and promising to remedy them, by telling employees that it cannot increase wages and other benefits because of the Union, and I would find cumulative those allegations that are similar to other violations, as specified in the majority decision.

employment in order to discourage union membership or activities.

WE WILL NOT announce or grant wage increases or a bonus program, in order to discourage union membership.

WE WILL NOT impose unlawful restrictions on the rights of employees to discuss unions or other protected concerted activities.

WE WILL NOT solicit grievances, or promise to remedy them, in order to discourage union membership or support.

WE WILL NOT tell employees that we cannot increase wages or benefits because of union activity, in order to discourage union membership or support.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

BLT ENTERPRISES OF SACRAMENTO, INC., D/B/A SACRAMENTO RECYCLING AND TRANSFER STATION

Marilyn O'Rourke and *Michael Smith*, for the General Counsel.
Dennis R. Murphy (Murphy, Austin, Adams & Schoenfeld), of Sacramento, California, for the Respondent.
Matthew J. Gauger, (Van Bourg, Weinburg, Roger & Rosenfeld), of Sacramento, California, for the Union.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Sacramento, California, on September 16–20 and 23–25, 2002. On November 27, 2001, Chauffeurs, Teamsters and Helpers, Local No. 150, International, Brotherhood of Teamsters, AFL–CIO (the Union) filed the charge in Case 20–CA–30455–1 alleging that BLT Enterprises of Sacramento, Inc., d/b/a Sacramento Recycling and Transfer Station (Respondent) committed certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Union filed the charge in Case 20–CA–30455–4 on December 20, 2001. That charge was amended on April 30, 2002. On January 3, 2002, the Union filed the charge in Case 20–CA–30455–5. That charge was amended on April 30, 2002. The Union filed the charge in Case 20–CA–30455–6 on February 4, 2002. On May 16, 2002, the Regional Director for Region 20 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent in all four cases alleging that Respondent violated Section 8(a)(1) and (3) of the Act. Respondent filed a timely answer to the complaint denying all wrongdoing. The Regional Director amended the consolidated complaint at the hearing.

The Union filed a representation petition, on November 14, 2001, in Case 20–RC–17713 seeking to represent Respondent's truckdriving employees. An election was held on December 21, 2001.[1] The tally of ballots shows 19 for and 13 against the Union, with 4 challenged ballots, an insufficient number to affect the results. The Union and Respondent each filed timely objections to the conduct of the election. A hearing on the Respondent's objections was held on March 14, 2002. On April 30, 2002, a hearing officer's report and recommendations on objections issued. In her report, the hearing officer recommended that the Respondent's objections be overruled. The Employer filed timely exceptions to the hearing officer's report. On July 25, 2002, the Board remanded the representation case to the hearing officer for further consideration. On August 2, 2002, the Board rescinded the remand order of July 25, adopted the hearing officer's findings and recommendations and issued a Decision, Order and Certification of Representative. The Board certified the Union as the exclusive collective-bargaining agent of Respondent's truckdrivers at its Sacramento, California facility.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses and to file briefs. Upon the entire record,[2] from my observation of the demeanor of the witnesses[3] and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a California corporation with an office and place of business in Sacramento, California, where it is engaged in the business of processing recyclable materials. During the 12 months prior to issuance of the complaint, Respondent provided services valued in excess of $50,000 to the City of Sacramento, an entity that meets one of the Board's standards for the assertion of jurisdiction on a direct basis. Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

---

[1] The election was held in the following appropriate collective-bargaining unit:

> All full-time and regular part-time truck drivers employed by Respondent at its 849 Fruitridge Road, Sacramento, California facility; excluding foremen, office clerical employees, Class B yard driver, sorters, janitors, machine operators, weight masters, rakers, traffic controllers, laborers, maintenance employees, guards, and supervisors as defined in the Act.

[2] General Counsel filed a motion to correct the transcript on November 23, 2002. As the motion was unopposed, the motion is granted and the corrections therein are received in evidence as Judge's Exh. 1.

[3] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Manufacturing Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues

The complaint alleges that dispatcher Walter Chenoweth unlawfully threatened employees that Respondent would subcontract bargaining unit work if the employees selected union representation, created the impression that Respondent kept the union activities of employees under surveillance, interrogated employees about their union activities, and threatened employees that they would not receive work assignments because of their union activities. The complaint alleges and the answer denies that Chenoweth is an agent of Respondent within the meaning of the Act.

The complaint alleges that Supervisor Steve Albin, threatened to discharge employees because of their union activities, and promised wage increases in order to discourage union activities. The complaint alleges that Shawn Gutterson, vice president, promised wage increases, interrogated employees, created the impression of surveillance, threatened to subcontract work, solicited employee grievances and impliedly promised to remedy said grievances, threatened to freeze employee wages, and granted a wage increase, in order to discourage union activities.

The complaint also alleges that Gilbert Pineda, transportation manager, threatened to withhold holiday pay, promised increased wages, promulgated a rule against remaining on Respondent's premises, and promulgated an English-speaking only rule. The complaint further alleges that Jeff Donlevy, general manager, promulgated a rule against remaining on Respondent's premises and a rule against employee conversations. The complaint also alleges that President Bernie Hubberman, interrogated employees and solicited employee grievances and impliedly promised to remedy said grievances. The complaint alleges that Mary Lou Nuno, human resources supervisor, interrogated employees about their union activities.

Further, the complaint alleges that Respondent refused the request of employee Gary Wickey to be represented by a coworker during an interview at which Wickey reasonably believed would result in disciplinary action. The complaint alleges that Respondent unlawfully withheld holiday pay for Thanksgiving in 2001. The complaint alleges that Respondent unlawfully granted a wage increase on December 18, 2001, and unlawfully granted a bonus on December 20, 2001.

Further the complaint alleges that Respondent discriminatorily discharged truckdrivers Ralph Adams, Theodore Doremus, Arthur McClure, John Murphy, and William Vasconsellas for union activities on November 7, 2001.

B. The Unfair Labor Practices

1. Background

Respondent is engaged in the business of processing recyclable materials and hauling trash for the City of Sacramento to landfills in Lockwood, Nevada, and Anderson and Stockton, California. From April 1999, until September 23, 2001, Respondent subcontracted the trash hauling (trucking) operation to a company named Waste Transport. Respondent owned and maintained the trucks and trailers. Waste Transport employed approximately 40 employees who drove trash from Respondent's facility or yard to the landfills.

By the summer of 2001, Respondent was experiencing problems with the manner in which Waste Transport was managing the driving operations. Waste Transport was not moving the trash out in a timely manner, not using the equipment efficiently, and was having financial problems. Waste Transport was at times failing to pay its employees and vendors. The truckdrivers were also experiencing problems with Waste Transport regarding wages, benefits, and hours of employment.

During the summer of 2001, the drivers employed by Waste Transport discussed the possibility of union representation. These discussions took place in the truckyard at Respondent's facility, on CB radios while the drivers were driving their routes and at restaurants. In an attempt to show knowledge of these conversations by Respondent, General Counsel offered the testimony of former driver Tammie Edwards. Edwards testified that in July 2001, prior to the takeover of the hauling operations by Respondent, she told Jeff Donlevy, Respondent's general manager that the drivers were unhappy with Waste Transport and were talking with a union representative. According to Edwards about a month later, Donlevy asked whether things were getting any better. Edwards told Donlevy that it was not getting better and that she might take a union job elsewhere. Donlevy told Edwards that Respondent was "looking at taking over" the trucking operation from Waste Transport and asked Edwards to stay.

General Counsel also presented the testimony of former driver Ted Doremus. According to Doremus, Donlevy told him that things would get better once Respondent took over the trucking operations from Waste Transport. Doremus answered that he hoped Respondent was "not just blowing smoke up our asses again." According to Doremus, he told Donlevy that the employees needed a union because Waste Transport was requiring drivers to drive too many hours and too fast.

In mid-September, Steve Albin, transportation manager asked employees about their problems with Waste Transport. Albin had been assigned to help the Sacramento facility with the transition of the driving operations from Waste Transport to Respondent. Albin asked the employees for suggestions regarding improving the truckdriving operation. Edwards told Albin that she hoped the operation would improve when Respondent took over. Edwards also told Albin that the employees had been talking to a union, but that she would rather see the operation be nonunion, if the employees received comparable benefits.

On September 14 and September 22, Respondent held orientation meetings with the truckdrivers whom it intended to employ. Respondent advised the drivers that it intended to operate with one and one-half runs to the Lockwood, Nevada landfill each day.[4] Waste Transport had been requiring, or at least permitting two round trips a day. Two round trips a day would

[4] A "run" is a round trip from Respondent's facility to a landfill with a return. "One and one-half runs" is a trip to Lockwood, a return to Dutch Flat, a trip to Lockwood and a return to Sacramento or a trip to Dutch Flat (a staging area), a return to Sacramento, followed by a return trip to Lockwood.

by necessity require a driver to exceed the legal number of hours permitted by the Department of Transportation. Respondent notified the drivers that it would require drivers to drive one and one-half loads a day and do so on strict schedules. The drivers were paid by load and not by the hour. Respondent announced a pay schedule, which paid a premium to drivers who drove one and one-half loads as opposed to a single load. Respondent rented a parking lot at Dutch Flat, California, approximately half way between its Sacramento yard and the Lockwood landfill.

At the orientation meetings, Respondent distributed its employment policies, safety program, and sexual harassment program. At this meeting the initial pay rates were handed out and Respondent advised the employees that it would be reviewing the rates during the transition period. Employees were required to fill out job applications with Respondent as well as other employment forms.

On September 24, Respondent took over the driving operations that it had previously subcontracted to Waste Transport. Respondent brought in Albin and Tom Hamilton, transportation supervisor, from its Southern California facilities to supervise the transition. The employees of Waste Transport were hired by Respondent and continued to perform the same work at the same facility, using the same equipment as they had when employed by Waste Transport.

Shortly after the takeover by Respondent, Respondent's truckdrivers began complaining to each other about working conditions. Discussions occurred in the truckyard, at the landfills, Dutch Flat, and in the drivers' room. The drivers' room is near the dispatch office used by Chenoweth and Supervisor Gilbert Pineda. There is insufficient evidence that Respondent overheard any of these conversations.

General Counsel contends that in October, drivers Jim Gowan and Gary Wickey talked to driver Fred Sarey about obtaining union representation. Sarey told Pineda about the conversation and that he did not want a union. I find that these events occurred in November, after the employees were discharged.

The drivers spoke about the Union on their CB radios. General Counsel argues that the conversations about the Union took place on public airwaves and that anyone with a CB radio could have overheard the conversations. However, these CB radios only have a range of one to two miles. There is no evidence that Respondent's supervisors or managers were in a position to overhear any of these conversations.

On the evening of Sunday, November 4, 2001, drivers James Gowan, Allan Howton, Terry Kent, and Rick Simpson attended a meeting with Union Representative Chris Folkman. The next day, Simpson went to the Union's offices and obtained union authorization cards. Simpson brought the union cards to work and left cards in the cars of Gowan, Kent, and Howton, so that they could obtain signatures from other drivers. Simpson handed out cards to three other employees on November 5, and received one signed card back that day. Gowan also handed out union authorization cards that day and observed five or six employees sign cards for the Union. On November 6, Gowan spoke to another six employees about the Union. Howton also distributed cards on November 5 and 6.

On November 7, 2001, Respondent discharged five truckdrivers. When Adams arrived at work that morning, he was told by Pineda that Albin and Donlevy wanted to see him in the office. Adams went to the office and met with Albin, Donlevy, and Mary Lou Nuno, human resources and safety manager. Albin told Adams that his services were no longer required. When Adams asked what Albin meant, Albin answered that Adams did not "fit into the scheme of things." Adams said he had to know the real reason. Albin repeated that Adams did not fit into the scheme of things and told Adams that Respondent was an "at will company" and could do what it wanted. Albin asked Adams to sign a termination notice and Adams signed. The termination notice gives no reason for the discharge. Adams asked Donlevy what was happening and Donlevy told Adams that the employee just did not fit into the scheme of things. Adams signed a card for the Union on November 6. Adams had no previous disciplinary history.

William Vasconsellas was also discharged on the morning of November 7. Vasconsellas met with Albin, Donlevy, and Nuno. Vasconsellas was told that his services were no longer required and that he did not "fit in." Vasconsellas replied that he was being given an excuse and not a reason. Vasconsellas signed the termination notice that he was given. The termination notice gave no reason for the discharge. Similar to Adams, Vasconsellas had no prior disciplinary history.

Ted Doremus arrived for work after noon on November 7. Doremus also met with Albin, Donlevy, and Nuno. Albin told Doremus that his services were no longer required. Doremus asked why and Albin answered that Doremus did not "fit in" to the organization. Albin told Doremus that Respondent did not need a reason because Doremus had not yet completed his probationary period. The termination letter gave no reason for the discharge. Doremus had no discipline in his personnel file but, as will be seen below, had previously been warned that he was not to take his dog with him while driving for Respondent. Notwithstanding these warnings, Doremus continued to take his dog on his driving runs.

John Murphy began work at midnight, drove a load to Dutch Flat and returned for another load for Lockwood. After completing a round trip to Lockwood, Murphy was called into the office. Albin told Murphy that his services were no longer needed. Murphy asked why and Donlevy answered that Murphy did not "fit in." Murphy asked why he did not fit in and was told that Respondent " did not want to get into it." Murphy refused to sign his termination notice. The termination letter gives no reason for the discharge. Unlike the other employees, Murphy had received a written warning. On October 26, 2001, Murphy along with three other employees, had received a warning from Albin for driving too closely with the other drivers. At the time that Pineda handed Murphy the written warning, he told Murphy that the warning did not mean a lot. Pineda said that Albin did not want the trucks to look like a caravan.

Arthur McClure arrived at work at about 11:30 p.m. McClure met with Albin and Tom Hamilton. Albin told McClure that Respondent was an at will company and had decided to discharge McClure. McClure signed the termination notice. McClure said that he would be willing to work as a

relief driver if Respondent needed him. McClure had no prior disciplinary history. He testified that in mid-October, Albin had told him that he was doing a great job.

On November 8, Respondent held drivers' meetings. At one of the sessions, a driver asked whether there would be any more discharges. Albin referred to the day of the discharges as "black Wednesday" and said there would be not be another "black Wednesday" or any further discharges unless somebody "pissed him off." Albin discussed a possible raise and also discussed a contemplated tire, chain, and fuel bonus program. At these meetings, Gutterson stated that Respondent was aware that the employees were not happy with the rate of pay, and Respondent had time to observe its operations, and that Respondent might be able to raise the pay.

After the discharges, the union organizing activities increased. On November 14, the Union filed its representation petition with the Board. A copy of the petition was mailed and faxed to Respondent on November 16.

In mid-November, Chenoweth approached drivers Daniel Mariea and Marin Mariea and asked whether they were for the company or for the Union. Daniel Mariea did not give a straight answer. In early December, Chenoweth asked Daniel Mariea whether he was for the Union. Marin Mariea and Pineda were also present. Chenoweth said, "I want a straight answer. Are you for the Union or against the Union?" Mariea joked that he did not want to be part of the Mafia and Pineda and Chenoweth laughed. Chenoweth patted Daniel on the back and said "That's our guy right here."

Gowen testified that after the petition was filed Pineda approached him in the parking lot and told him, "I know what's going on around here, and if you want to have these discussions regarding union propaganda, you need to do it away from the facility and on your own time, and you have 15 minutes from the time you log off duty and turn your paperwork in to leave the facility." Drivers were never told or warned about any such rule before the union petition was filed.

Employee Gary Wickey testified that during the third week of November, Chenoweth told him that Shawn Gutterson, Respondent's vice president, had told Chenoweth to inform the drivers that Respondent would subcontract the driving work to two other companies, before he would let a union come in. Fifteen minutes later, Wickey approached Chenoweth and asked whether Chenoweth had been joking. Chenoweth responded that he had told Wickey exactly what Gutterson had directed him to say. Fred Sarey also testified that Gutterson told him that if things did not work out, Respondent would sell the trucks and subcontract the work.

Howton testified that on or about November 20, Chenoweth told him that the subcontractor who hauled recycling for Respondent was interested in subcontracting the hauling done by the bargaining unit employees. Chenoweth said that Respondent would never let the Union into the company. According to Howton, Chenoweth stated that the drivers made good money and they would be sorry if the Union got in. Chenoweth stated Respondent would probably subcontract out the trash hauling and could sell the trucks to the subcontractor.

The truckdriver employees had been told in the orientation meetings in September that as new employees they would not be eligible for holiday pay at Thanksgiving. On November 21, Chenoweth told Howton that Gutterson was working to get the employees holiday pay for Thanksgiving. Howton, in the presence of driver Chuck Watts, asked Pineda about the holiday pay. Pineda told the drivers that because the Union had filed the petition, Respondent could not give the holiday pay. Pineda explained that the drivers' 90-day probationary period was not yet over. Respondent had told the employees at the orientation meetings that, as probationary employees, they would not be eligible for holiday pay for Thanksgiving.

Gowen testified that after the petition was filed, Chenoweth approached him at work and stated that he knew that Gowen had been one of the employees who started the union organizing effort. Chenoweth stated that he thought the drivers did not need a union. Chenoweth said that before the Union came in, the drivers "would all be working elsewhere, that another company would be hauling the trash." Similarly, Wickey testified that Chenoweth told him in late November "management believes that you and Jim Gowen are the ones that started the Union." In a later conversation, Chenoweth said to Wickey, "Hey, here comes the Union guy." Wickey objected and Chenoweth apologized.

Driver Ruben Martinez testified that at a meeting with Jeff Donlevy, general manager, Pineda, and Marylou Nuno, Donlevy told Martinez he could only be on the premises for 15 minutes before the start time, and only 10 minutes after he finished his paperwork. Martinez and employee Jesse Peavyhouse both testified that there had been no such rule prior to the filing of the petition.

In late November, and on several occasions until January 2002, Respondent began to prohibit its Romanian-speaking drivers from speaking Romanian at work. At that time, Respondent employed four Romanian-speaking drivers. Marin Mariea and his son Daniel Mariea often acted as interpreters for the other Romanian drivers. On several occasions between November and January, Pineda told the Romanian drivers to speak English and not Romanian. After the election, Pineda again permitted the Romanian drivers to speak Romanian and permitted the Marieas to translate for the other Romanian drivers. In contrast, Respondent permitted its Spanish-speaking employees to speak Spanish. Pineda and Nuno speak Spanish. Pineda denied instructing any employee to stop speaking Romanian. The testimony of Daniel Mariea and Marin Mariea is credited over Pineda's denials.

Wickey testified that in early December he approached Gutterson about wages owed to him by Waste Transport. Gutterson had earlier stated that Respondent would make the drivers whole for wages not paid by Waste Transport. Gutterson said, "I understand you are one of the guys that was involved in starting the Union." Wickey attempted to discuss his wage problem. However, Gutterson asked how "the guys felt about the Union." Wickey responded that he could not speak for anyone else. The conversation then returned to the pay question. During this conversation, Gutterson stated that the subcontractor that hauled recycling for Respondent was interested in obtaining the work done by the bargaining unit employees.

Wickey testified that in early December, after he spoke with Gutterson in an attempt to recover monies owed to him by

Waste Transport, Pineda delivered a check to him. According to Wickey, Pineda declared that if Wickey voted against the Union, there would "probably" be more checks for Wickey. Pineda denied making this statement.

Also in early December, Pineda told Wickey, "After you get your truck loaded and parked, you have ten minutes to do your paperwork and you've got to be off the property." Pineda also stated that he would notify Gowen and Howton about this rule. Shortly thereafter, Donlevy approached Peavyhouse and told Peavyhouse that the driver was finished with his shift and had to leave. Donlevy said, "What's been going on can't go on anymore." Respondent admitted at trial that it communicated to the drivers the policy prohibiting them from arriving early or remaining more than 15 minutes after finishing their paperwork. Respondent claimed that this was the continuation of a previously existing policy. I find that the evidence does not support Respondent's claim.

On or about December 3, Chenoweth approached Wickey and told him, "I want to tell you I feel real bad the way management is treating you." Wickey said that he felt that he was being singled out. Chenoweth said "I almost quit my job over you." Chenoweth then stated that Respondent's management had gone through Wickey's driving logs in an attempt to find a reason to fire him.

On December 3, Chenoweth told Wickey that driver Fred Sarey had complained that Wickey had harassed Sarey at the landfill in Anderson, California. Wickey denied that he had harassed anyone. Two or 3 days later, Wickey was called to a meeting with Donlevy, Gutterson, and Bernie Hubberman, president of Respondent. Wickey asked if he could have a witness other than someone from management. Donlevy denied the request. According to Wickey, Hubberman asked why the drivers were unhappy. Wickey asked Hubberman some personal questions. Gutterson asked why the drivers wanted a union and what it would take to make the drivers happy. Donlevy asked what had happened between Wickey and Sarey at the Anderson landfill. Donlevy said that Wickey was accused of threatening Sarey. Wickey admitted having a conversation with Sarey but denied harassing or threatening Sarey. Donlevy said he would have to confirm Wickey's story. Both Donlevy and Hubberman deny that Wickey requested a witness.

The next day, Pineda invited Wickey back into Donlevy's office. Wickey again requested a witness. Donlevy denied the request. Wickey said that he and Sarey had discussed the matter and agreed that there was no problem. Donlevy responded, "I'm going to make it very clear to you Gary, If there's any physical or verbal problems with Fred, we're going to hold you personally responsible no matter if it happens on or off the property." Respondent concedes that Wickey requested a witness at this meeting.

Three days later, Wickey was called into a third meeting with Donlevy, Pineda, and Nuno. Wickey again requested a nonmanagement witness. Again, Donlevy denied the request. Donlevy said that Respondent wanted to resolve the situation. Wickey answered that he already had two meetings and he felt threatened. Nuno then ended the meeting. The harassment allegations were finally cleared a few days later at a meeting, which included Sarey. Sarey testified he told Nuno and Donlevy that Wickey had not threatened him. Respondent contends that the meetings of December 7 and 8 were held in response to a complaint made by Wickey against Sarey.

In mid-December Chenoweth questioned Sarey about the Union. He gave Sarey five names and asked whether those employees supported the Union. Chenoweth mentioned Wickey, Gowen, Marin Mariea, Daniel Mariea, and Allan Howton.

On December 4, Respondent held meetings with its drivers to discuss the upcoming election. Gutterson told employees that Respondent wanted to give the drivers a raise but could not do so because the Union had filed a petition. Gutterson also said Respondent could not make changes in benefits. Gutterson told the employees that he had an open door policy and that any of the drivers could come to him at any time. General Counsel contends that there was no prior open-door policy. Gutterson apologized for the rumors about subcontracting of the trash hauling but stated that subcontracting was not new and had always been an option.

In the December 10 meeting to discuss the Union, Gutterson again announced that Respondent could not grant a raise because of the Union petition. Gutterson said that Respondent had considered granting a raise but could not because that would be considered a bribe to defeat the Union.

At the December 18 meeting, Gutterson announced that after meeting with Respondent's lawyer, Respondent had decided to give the truckdrivers the raise it had previously stated that it could not give. The raise was retroactive to December 10. The rate for a single run from Sacramento to Lockwood was raised from $114 to $120. The rate for a run and one half run was raised from $178 to $190. In addition, Donlevy announced the specifics of a new tire, chain, and fleet fuel bonus program. Although the program was placed in effect, no bonuses have been earned under this new program.

General Counsel contends that Respondent violated the Act by publishing a letter on December 17 and 18, which stated inter alia,

> [Waste Transport] failed and is out of business because it did not maintain efficient schedules and utilize its equipment efficiently. The drivers who left our employment are the ones who refused to cooperate in making this an efficient operation. We believe that those drivers who remain, our current Class A drivers, understand the reasonable business needs for schedules and efficiency in utilization of equipment. We are sure that no one wants [Respondent] to fail and have to lay off employees as did [Waste Transport]. All [Waste Transport] drivers that completed our orientation and pre-hire process were offered driving positions with Sacramento Recycling.

On December 20 and 21, Respondent granted Christmas bonuses to the truckdrivers. The drivers were given $50 Christmas bonuses. Employee Rick Simpson testified that when Donlevy gave him his bonus check, Donlevy asked whether Simpson was voting in the election. Simpson answered that he was going to vote and Donlevy replied, "Just remember, we don't want the Union being voted in here." In the past, Respondent had given Christmas bonuses to its production and

maintenance employees at its Sacramento facility. The drivers, however, had still not passed their 90-day probationary period.

Wickey testified that on the afternoon of the December 21 election, he told Gutterson that he was an observer. Gutterson asked for whom Wickey was observing and Wickey answered that he was there for the Union. After Wickey asked how Gutterson was doing, Gutterson replied, "I don't appreciate you putting me through this and I will remember this." Gutterson denied this testimony.

In January 2002, Donlevy observed Ruben Martinez talking to another driver. Donlevy later approached Martinez and said that Martinez did not need to be talking to other drivers in the yard.

In early January, Marin Mariea approached Chenoweth and asked why he was not getting Saturday loads to drive, while new employees appeared to be getting Saturday loads, Chenoweth responded, "You guys who f— around with the Union. I'll let you know Union. You guys are on the Sunday list."

In January 2002, Nuno called Wickey into her office and asked whether Wickey had harassed driver Steve Crothers. Nuno asked if there had been a conversation between Crothers and Wickey. Wickey answered that there had been. According to Wickey, Nuno asked whether there had been a conversation about Crothers voting against the Union. Wickey denied that accusation. Nuno then asked whether Wickey had harassed Crothers about missing a union meeting. Wickey denied doing so. Wickey told Nuno that he had a conversation with Crothers in which Crothers apologized for missing a union meeting.

On February 18, 2002, Martinez complained to Gutterson about Pineda and Donlevy. Gutterson replied, "Ruben, what's wrong with you?" Gutterson stated that Martinez could not get along with Albin, Donlevy, or Pineda. He said that Martinez was not happy working for Respondent and that Martinez should quit. He asked why Martinez did not quit and get another job. Gutterson complained that Martinez had cost the company $20,000 a month for the last 2 months.[5] Martinez answered that he was just trying to do his job. Gutterson only admitted telling Martinez, "the grass is greener on the other side." Gutterson denied accusing Martinez of costing the company money. Martinez's version of these events is credited.

Gowen testified that on March 28, 2002, he was looking at a copy of a newspaper article left in the dispatch office. The article concerned the union organizing drive and contained pictures of current employees and union officials. Gowen told Chenoweth that he would not want his name connected with the article, that it might cause problems. Chenoweth answered that was the smartest comment he had heard about the article. Chenoweth then declared that the people in the article and the union activity "would be haunted the rest of their short existence at Sacramento Recycling, and wherever else they'd go, wherever they may be."

2. Respondent's defense

Respondent contends that it was unaware of any union activity until it received a facsimile copy of the petition on the afternoon of Friday, November 16, 2001. Thus, Respondent argues that the five discharges at issue herein could not have been motivated by the employees' union activities.

Respondent contends that it discharged the five employees for legitimate business reasons. Respondent's evidence indicates that the decision to discharge the employees was made on November 1 or 2. Replacement drivers were hired to begin work on November 5, 2001. Respondent was attempting to convert the sloppy operation run by Waste Transport into a more efficient operation. According to Albin and Donlevy, Respondent decided to conduct a 30-day review of the driving operation. In early November, Albin discussed the drivers with Hamilton, Pineda, Donlevy, Nuno, and Mario Quezada, corporate human resources director.

According to Respondent, the employees selected for termination were objecting to and not cooperating in Respondent's schedule changes. Hamilton testified that Adams refused to drive a load and a one-half. According to Donlevy, on 12 occasions Adams was scheduled to drive a load and one-half but only drove a single load. On November 2, the day the termination decision was made, Adams was scheduled to drive a load and one-half but only drove a single load. In addition to dictating the amount of hours that he would drive, Adams also insisted on a particular start time. While Adams could have chosen a start time that coincided with a single load, he chose a start time that Respondent had scheduled for a load and a half. Finally, Adams had stated on numerous occasions that he would not drive with snow chains. Adams was discharged prior to the time that snow conditions became an issue.

Doremus was warned on several occasions not to drive with his dog in his truck. Gutterson, Hamilton, Donlevy, and Albin all instructed Doremus that he could not bring his dog with him on his trips. Notwithstanding these warnings, Doremus continued to bring his dog on his driving trips. On November 2, when Respondent was conducting its review of the drivers, Albin found Doremus at the Dutch Flat parking lot with his dog. Doremus compounded this infraction by telling Albin to "go f— yourself."

Pineda testified that McClure originally was willing to drive a load and one-half load. However, after a period of time McClure began to miss work without calling in. On one occasion, McClure missed his midnight shift, but showed up later to collect his paycheck. On other occasions, McClure drove only a single load even though he had been scheduled to run a load and a half. On November 1 and 2, when Respondent was reviewing the drivers, McClure drove only a single load despite being scheduled to drive a load and a half.

Murphy testified that on October 14 and October 18, 2001, he did not drive his scheduled route. According to Murphy, someone had taken his assigned truck and so he went home. He admitted that he did not report this to any dispatcher or supervisor. Thus, Respondent believed that Murphy did report to work and did not call in on those occasions. On November 1, Murphy told Pineda that he had already driven his allotted hours and could not drive his assigned route on November 2. Pineda asked Murphy to review his log sheets and call Pineda back. Murphy did not call Pineda back. Thereafter, Pineda

[5] Martinez had become a union steward.

reviewed Respondent's records and found that Murphy had enough allowable hours to drive on November 2.

Vasconcellas admitted that he drove only a single load in spite of Respondent's intent on having drivers drive one and a half loads. Vasconcellas admitted that after he completed his route, he was required to "load, tarp and weigh" the truck. Hamilton testified that he instructed Vasconcellas a number of times to load and tarp his truck before leaving. Notwithstanding these instructions, Vasconcellas, on several occasions, left work without loading and tarping. Two such occasions occurred on October 30 and 31, 2001.

Respondent contends that it simply maintained the statues quo with respect to Thanksgiving holiday pay, Christmas bonuses, its wage increases, and tire bonuses. At the orientation meetings in September, Respondent announced that the employees were probationary employees for 90 days and that holiday benefits would not be paid during that 90-day period. Respondent specifically declared that the first holiday that the drivers would be eligible for would be Christmas. Thereafter in November, drivers did attempt to obtain holiday pay for Thanksgiving and Respondent answered that during the election period it had to maintain the status quo.

Respondent has had a past practice of paying Christmas bonuses to its employees. Respondent previously paid similar bonuses to its production and maintenance employees. The amount of the bonus ($50) was consistent with that paid production employees. Further, Respondent showed that employees, who worked less than 90 days for Respondent, nonetheless received the Christmas bonus. The bonuses have regularly been given in the pay period preceding Christmas.

With respect to the increase in pay, Respondent indicated to the employees in September that adjustments to the pay schedule would be made. Changes to the rate schedule were also mentioned at the meetings on November 8. However, no specifics were given. Respondent raised the possibility of tire and chain bonuses in September and again in November but no specifics were given until the December 15 meeting.

C. The Agency Status of Walt Chenoweth

Chenoweth was a driver with Waste Transport and became a driver for Respondent effective September 24, 2001. Chenoweth applied for and was awarded the position of dispatcher effective November 11. Chenoweth continues to drive for Respondent as needed but his main responsibility is dispatching. Chenoweth was not included in the bargaining unit. General Counsel does not contend that Chenoweth is a supervisor within the meaning of the Act. Chenoweth's direct supervisor is Pineda, Respondent's transportation supervisor.

For several hours a day, Chenoweth is the highest-ranking employee at the facility. That is because Chenoweth and several drivers begin work before the supervisors report to work. Respondent passed out cards to employees containing important phone numbers. On these cards Chenoweth was listed as a supervisor. Chenoweth was also listed along with all Respondent's statutory supervisors on a memorandum distributed for the Thanksgiving holiday. Chenoweth also signed the season greetings notice signed by the statutory supervisors and distributed to employees in December 2001.

In performing his dispatching duties, Chenoweth on occasion changes employees' schedules, authorizes pay for delay time, and authorizes pay for show up time. Although Chenoweth is not directly involved in discipline, he makes reports to Pineda which may result in discipline.

The Board applies the common law principles of agency when determining whether an employee is an agent of the employer. *Southern Bag Corp.*, 315 NLRB 725 (1994). Apparent authority results from a manifestation by the principal to the third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question. *Southern Bag Corp.*, 315 NLRB 725 (1994); *Beaird Industries*, 311 NLRB 768 (1993); *Albertsons, Inc.*, 307 NLRB (1992). The test is whether, under all of the circumstances, the employees would reasonably believe that the alleged agent was reflecting company policy and speaking and acting for management. *Waterbed World*, 286 NLRB 425, 426–427 (1987). Stated in a more subjective manner, "an employer can be responsible for the conduct of an employee, as an agent, where under all the circumstances the employees would reasonably believe that the individual was reflecting company policy and acting on behalf of management." *Kosher Plaza Supermarket*, 313 NLRB 74, 85 (1993). As stated in Section 2(13) of the Act, when making an agency determination, "the question of whether the specific acts were actually authorized or subsequently ratified shall not be controlling." *GM Electrics*, 323 NLRB 125 (1997); *Southern Bag Corp.*, id.

I find that Respondent used Chenoweth as a "conduit" of information from management to employees with respect to such important matters as job assignments, work rules and instructions, and management's views. See, for example: *Speed Mail Service*, 251 NLRB 476 (1980); *Sears Roebuck de Puerto Rico*, 284 NLRB 258, 259 (1987); *Victor's Café*, 321 NLRB 504 (1996); *Zimmerman Plumbing & Heating Co.*, 325 NLRB 106 (1997), enfd. in pertinent part 188 F.3d 508 (6th Cir. 1999). Further, Respondent held Chenoweth out as a supervisor and part of the management team.

Thus, I find that Chenoweth possessed the apparent authority to speak on the Respondent's behalf and, therefore, spoke as Respondent's agent. See *Electronic Data Systems Corp.*, 305 NLRB 219 (1991) (the Board found in agreement with the administrative law judge that a dispatcher was the Respondent's agent, cloaked with apparent authority, when she unlawfully interrogated and made coercive statements to employees).

D. Analysis and Conclusions

1. The alleged discriminatory discharges of November 7

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United

States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983).

It has long been held that there are five principal elements that constitute a prima facie case insofar as Section 8(a)(3) and (1) are concerned. The first is that the employee alleged to be unlawfully disciplined must have engaged in union or protected activities. The second is that the employer knew about those protected activities. Third, there must be evidence that the employer harbored animus against those individuals because of such activities. Fourth, the employer must discriminate in terms of employment. Finally, the discipline must usually be connected to the protected activity in terms of timing. See, e.g., *Goodyear Tire & Rubber Co.*, 312 NLRB 674 (1993).

It is axiomatic that an employer cannot have been "motivated" by an employee's prounion activities or sympathies to take action affecting that employee's status if the employer did not know or have a belief about the employee's activities or sympathies. Indeed, credible evidence of "employer knowledge" is a necessary part of the General Counsel's burden, and without it, the complaint cannot survive. *Stanford Linear Accelerator Center*, 328 NLRB 464 (1999); *American Postal Workers (Postal Service)*, 278 NLRB 751, 752–753 (1986).

General Counsel contends that Respondent had general knowledge of union organizing prior to the discharges. The evidence indicates that Respondent had knowledge that the employees were unhappy with working conditions under Waste Transport. Further, Respondent was aware that there was vague talk of unions by the Waste Transport employees. Notwithstanding these facts, Respondent hired all of the former employees of Waste Transport. Further, Respondent was aware that all the problems had not yet been resolved by early November. However, Respondent was working on setting regular driving schedules and making more efficient use of its equipment. It is clear that, unrelated to any union considerations, Respondent was attempting to improve on the inefficient, and sometimes unlawful, operations of Waste Transport. There is no direct evidence that Respondent was aware that the vague talk of unions had turned into action on November 4, 2001. Nor is there any direct evidence that Respondent was aware of the activities that took place on November 5. As General Counsel correctly argues, knowledge of union activities need not be established directly, "but may rest on circumstantial evidence from which a reasonable inference of knowledge may be drawn." *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995).

Knowledge of the employees' union activity can be implied from the Board's small plant doctrine. The small plant doctrine may be applied where the facility is small and open, the work force is small, the employees made no great effort to conceal their union conversations, and management personnel are located in the immediate vicinity of the protected activity. *Health Care Logistics*, 784 F.2d 232 (6th Cir. 1986). The small plant doctrine is an application of circumstantial evidence. The mere fact that an employer's plant is of a small size does not permit a finding that the employer had knowledge of the union activities of specific employees, absent supporting evidence that the union activities were carried on in such a manner, or at times that in the normal course of events, the employer must have known about them. See, e.g., *NLRB v. Mid States Sportswear*, 412 F.2d 537, 540 (5th Cir. 1969), quoting *NLRB v. Joseph Antell, Inc.*, 358 F.2d 880 (1st Cir. 1966).

The facts of this case do not establish the applicability of the small plant doctrine. The employees' activities took place in Respondent's truckyard, at landfills used by Respondent and over the CB radios while the drivers were driving their loads. The work force is small, approximately 35 employees. However, the truckyard is large with wide open areas far away from Respondent's supervisors. Respondent's supervisors are usually not present at the landfills. There is no credible evidence that Respondent's supervisors were in range to hear CB conversations, or even had access to a CB radio. The employees were discrete about their union meeting and attempted to conceal the signing of union cards. The union activities increased dramatically after the five employees were discharged. Under all these facts and circumstances, I conclude that the small plant doctrine is inapplicable and does not establish that Respondent had knowledge of the employees' activity prior to the discharges.

Other circumstantial evidence seems to confirm Respondent's assertion that it did not learn of the organizing campaign until November 16. When Gutterson received the petition on the afternoon of November 16, he immediately asked Chenoweth what the dispatcher knew about the petition and the Union. Shortly thereafter, Chenoweth began interrogating employees about the Union. When employee Sarey told Chenoweth about being asked to sign for the Union, Chenoweth told Sarey that Respondent first learned about the Union when it received the petition by fax on November 16. Although Respondent made numerous statements in an attempt to defeat the Union, none of these statements were made until after November 16.

While General Counsel argues that I should draw an inference of discrimination from Respondent's failure to give the employees a specific reason for discharge, I refuse to draw such an inference in this case. Respondent informed the employees at the time of hire that it was an "at will employer." Further, Respondent notified the employees that they were probationary employees for a period of 90 days. While it may not be the best personnel policy, it has not been shown to be discriminatory for Respondent to give a generic reason for the discharges. It cannot under these facts be discriminatory for Respondent to tell the discharged employees that it was an at will employer. Respondent did present evidence that the five employees were not, in its opinion, cooperating with its attempts to improve the efficiency of the newly acquired operation. Each of the employees engaged in, what Respondent considered to be, misconduct in the period from October 30 to November 2; the very time that Respondent's supervisors were reviewing the driving operation.

The General Counsel argues that Albin's statement of November 8 that there would be no further discharges unless somebody "pissed him off" was a threat of discharge for union activities because employees did not know what would "piss off" Albin. Again, this appears not to be the best personnel policy, however, it also appears to be unconnected to union activity. As discussed above, it does not appear that Respon-

dent had knowledge of the union activities until it received a copy of the Union's petition on November 16.

Under these facts and circumstances, I find that the General Counsel has failed to establish a prima facie case with regard to the discharge of the five employees. More specifically, I find that the evidence does not establish that the Respondent had knowledge of any union activities on the part of any of its employees when it discharged Adams, Murphy, Doremus, McClure, and Vasconsellas on November 7, 2002.

2. The alleged interrogations

An employer violates Section 8(a)(1) of the Act by interrogating employees about their union activities or that of other employees under coercive circumstances. *NLRB v. Prineville Stud Co.*, 578 F.2d 1292 (9th Cir. 1978); *Bremol Electric, Inc.*, 271 NLRB 1557 (1984); *Pacemaker Driver Services*, 269 NLRB 971, 977–978 (1984). Interrogation of employees is not unlawful per se. In determining whether or not an interrogation violates Section 8(a)(1) of the Act, the Board looks at whether under all the circumstances the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Rossmore House*, 269 NLRB 1176 (1984); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). Relevant factors include the background, the nature of the information sought, the identity of the questioner, and the place and method of conversation. *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985).

Shortly after Respondent received the petition, Chenoweth approached drivers Daniel Mariea and Marin Mariea and asked whether they were for the company or for the Union. Daniel Mariea did not give a straight answer. In early December, Chenoweth again asked Daniel Mariea whether he was for the Union. Chenoweth said, "I want a straight answer. Are you for the Union or against the Union?" Mariea joked that he did not want to be part of the Mafia and Pineda and Chenoweth laughed. Chenoweth patted Daniel on the back and said, "That's our guy right here." In mid-December Chenoweth questioned Sarey about the Union. Sarey expressed his opposition to the Union. Chenoweth gave Sarey the names of five union supporters and asked whether those employees supported the Union.

In early December when Wickey approached Gutterson about wages owed to him by Waste Transport. Gutterson said, "I understand you are one of the guys that was involved in starting the Union." Wickey attempted to discuss his wage problem. However, Gutterson asked how the employees felt about the Union. Wickey responded that he could not speak for anyone else. During this conversation, Gutterson stated that the subcontractor that hauled recycling for Respondent was interested in subcontracting the trash hauling done by the bargaining unit drivers.

On or about December 3, Wickey attended a meeting with Donlevy, Gutterson, and Hubberman. Wickey asked if he could have a witness and Donlevy denied the request. Hubberman asked why the drivers were unhappy and Wickey asked Hubberman some personal questions. In this conversation, Gutterson also asked why the drivers wanted a union and what it would take to make the drivers happy.

Shortly before the election, when Donlevy gave Rick Simpson his bonus check, Donlevy asked whether Simpson was voting in the election. Simpson answered that he was going to vote and Donlevy replied, "Just remember, we don't want the Union being voted in here."

Here, I find that the interrogations by Chenoweth tended to interfere with and restrain the Marins and Sarey in their union and protected concerted activities. Chenoweth interrogated Daniel Marin on two occasions and insisted on an answer to his question about Marin's union sympathies. In his questioning of Sarey, Chenoweth named five union supporters and sought confirmation from Sarey that these employees were in fact union supporters. Such actions raise a reasonable belief that Respondent would take action against those employees engaged in protected activities. The totality of the circumstances existing during this questioning requires I find the questioning of these employees coercive and violative of Section 8(a)(1) of the Act. *Southwire Co.*, 282 NLRB 916, 917 (1987).

3. The granting of benefits

In *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964), the Supreme Court stated: "The danger inherent in well timed increases in benefits is the suggestion of a fist inside a velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged."

In *ARA Food Services*, 285 NLRB 221, 222 (1987), the Board stated:

> When a benefit is granted during the critical period before an election, the burden of showing that the timing was governed by factors other than the pending election is on the party who granted the benefit. The logic behind this legal principle is clear: only the party granting the benefit can explain why it chose to do so. An employer meets that burden if it presents evidence which establishes justification for its action.

See also *Comcast Cablevision*, 313 NLRB 22 (1993); *Elston Electronics Corp.*, 292 NLRB 510, 525–526 (1989).

In examining whether the wage increases amounted to an objectionable promise or grant of benefit, I must apply the test set out by the Board in *B & D Plastics*, 302 NLRB 245 (1991). Under *B & D Plastics*, the Board examines whether granting the benefit would tend unlawfully to influence the outcome of the election, taking into consideration the following factors: (1) the size of the benefit conferred in relation to the stated purpose for granting it; (2) the number of employees receiving it; (3) how employees reasonably would view the purpose of the benefit; and (4) the timing of the benefit.

In the instant case, employees were told in September and on November 8, that Respondent would possibly raise the amounts paid for driving routes. On November 8, employees were told of a contemplated tire, chain, and fuel bonus program. No specific date or amounts for these possible changes was announced. After the petition was filed, on December 4 and again on December 10, Gutterson told employees that no raises could be given because of the pending representation petition. Gutterson said that Respondent was considering granting raises but

could not do so because it would be considered a bribe. However, on December 18, just three days before the representation election, Gutterson announced that Respondent could grant pay increases and grant the tire, chain, and fuel bonus. For the first time the specifics of the increases for the routes were announced and the specifics of the bonus program were announced. The pay increases were made retroactive to December 10. The employees received the increase in the paychecks received just prior to the election. The requirements for the tire, chain, and fuel bonus were never met and, therefore, employees never received any monies under this bonus program.

Respondent has not met its burden of showing that the timing was governed by factors other than the pending election. First, I find that while the possibility of raises and bonuses were mentioned prior to the petition no specific date or amounts were mentioned. Second, after the petition was filed, Respondent repeatedly told the employees that the raises could not be granted because of the pending petition. Respondent's justification for the wage increases is that the increases coincided with the end of the employees' 90-day probationary period. However, Respondent offered no evidence to support this argument. December 10 was 2 weeks short of the 90-day period. Further, Respondent offered no explanation for the amounts of the raises. No explanation was given why the raises were not given after the election, and/or after the probationary period.

I find that the announcement of the raises was reasonably calculated to, and did, interfere with the employees in their freedom of choice in selecting or rejecting the Union as their collective-bargaining representative. Thus, I find that the announcement of the raises and the granting of those wage increases violated Section 8(a)(1) of the Act. I further find, that the announcement and establishment of the bonus program violated Section 8(a)(1) of the Act.

At the orientation meetings, Respondent made it clear to employees that they were hired subject to a 90-day probationary period. Respondent specifically stated that the employees would not receive holiday pay for Thanksgiving or Christmas. Although there is some evidence that Pineda raised the possibility of holiday pay for Thanksgiving, Respondent quickly resolved that issue by announcing that it could not change its policy while the petition was pending. Respondent clearly acted lawfully in refusing to grant holiday pay in contravention of its existing policy. If Respondent had granted the benefit, it would have violated Section 8(a)(1) of the Act.

The undisputed evidence shows that Respondent had an established policy of granting Christmas bonuses to its employees. The Christmas bonuses granted in this case were consistent with Respondent's past practice in the amount of the bonuses and in the timing. The fact that employees received the bonuses a few days before the 90-day probationary period was over is not controlling because Respondent acted consistent with its past practice in this regard as well.

4. The alleged unlawful threats

After the filing of the petition, Chenoweth told Wickey that Gutterson had told Chenoweth to inform the drivers that Respondent would subcontract the driving work to two other companies, before he would let a union come in. Fifteen minutes later, Wickey approached Chenoweth and asked whether Chenoweth had been joking. Chenoweth responded that he had told Wickey exactly what Gutterson had directed him to say. Sarey also testified that Gutterson told him that if things did not work out, Respondent would sell the trucks and subcontract the work.

On or about November 20, Chenoweth told Howton that the subcontractor who hauled recycling for Respondent was interested in subcontracting the hauling done by the bargaining unit employees. Chenoweth said that Respondent would never let the union into the company. Chenoweth stated that the drivers made good money and they would be sorry if the Union got in. Chenoweth also stated that Respondent would probably subcontract out the trash hauling and sell its trucks to the subcontractor.

After the petition was filed, Chenoweth approached Gowen at work and stated that he knew that Gowen had been one of the employees who started the union organizing effort. Chenoweth added that he thought the drivers did not need a Union. Finally, Chenoweth declared that before the Union came in, the drivers "would all be working elsewhere, that another company would be hauling the trash."

On or about December 3, Chenoweth approached Wickey and told him, "I want to tell you I feel real bad the way management is treating you." Wickey said that he felt that he was being singled out. Chenoweth said "I almost quit my job over you." Chenoweth then stated that Respondent's management had gone through Wickey's driving logs in an attempt to find a reason to fire him.

On the afternoon of the December 21 election, Wickey told Gutterson that he was an observer for the Union. Gutterson stated, "I don't appreciate you putting me through this and I will remember this."

In early January, Marin Mariea approached Chenoweth and asked why he was not getting Saturday loads to drive, while new employees appeared to be getting Saturday loads. Chenoweth responded, "You guys who f— around with the Union. I'll let you know Union. You guys are on the Sunday list."

On February 18, 2002, Martinez complained to Gutterson about Pineda and Donlevy. Gutterson replied, "Ruben, what's wrong with you?" Gutterson stated that Martinez could not get along with Albin, Donlevy, or Pineda. He said that if Martinez was not happy working for Respondent and that Martinez should quit. He asked why Martinez did not quit and get another job. Gutterson complained that Martinez had cost the company $20,000 a month for the last 2 months.[6] Martinez answered that he was just trying to do his job.

On March 28, 2002, Gowen was looking at a copy of a newspaper article left in the dispatch office. The article concerned the union organizing drive and contained pictures of current employees and union officials. Gowen told Chenoweth that he would not want his name connected with the article, that it might cause problems. Chenoweth answered that was the smartest comment he had heard about the article. Chenoweth then declared that the people in the article and the union activ-

[6] Martinez had become a union steward.

ity "would be haunted the rest of their short existence at Sacramento Recycling, and wherever else they'd go, wherever they may be."

I find that by threatening the employees with loss of employment for engaging in union activities, Respondent through Chenoweth and Gutterson violated Section 8(a)(1) of the Act. Respondent's threats of discharge, subcontracting of unit work and the resultant loss of employment, clearly tend to restrain and coerce employees in the exercise of their Section 7 rights. *Williamhouse of California*, 317 NLRB 699, 712–713 (1995); *Flexsteel Industries*, 311 NLRB 257, 268–269 (1993); *Teskid Aluminum Foundry*, 311 NLRB 711, 716–717 (1993).

5. The rule against remaining on Respondent's premises, and the rule against speaking Romanian

After the petition was filed Pineda approached Gowen in the parking lot and told him, "I know what's going on around here, and if you want to have these discussions regarding union propaganda, you need to do it away from the facility and on your own time, and you have 15 minutes from the time you log off duty and turn your paperwork in to leave the facility." Drivers were never told or warned about any such rule before the union petition was filed.

During a December meeting with Martinez, Pineda, and Nuno, Donlevy told Martinez he could only be on the premises for 15 minutes before the start time, and only 10 minutes after he finished his paperwork.

Also in early December, Pineda told Wickey, "After you get your truck loaded and parked, you have ten minutes to do your paperwork and you've got to be off the property." Pineda also stated that he would notify Gowen and Howton about this rule. Shortly thereafter, Donlevy approached Peavyhouse (Tr. 939–940) and told Peavyhouse that the driver was finished with his shift and had to leave. Donlevy said, "What's been going on can't go on anymore."

In January 2002, Donlevy observed Ruben Martinez talking to another driver. Donlevy later approached Martinez and said that Martinez did not need to be talking to other drivers in the yard.

In late November and on several occasions until January 2002, Respondent began to prohibit its Romanian-speaking drivers from speaking Romanian at work. At that time, Respondent employed four Romanian-speaking drivers. Marin and Daniel Mariea often acted as interpreters for the other Romanian drivers. On several occasions between November and January, Pineda told the Romanian drivers to speak English and not Romanian. After the election, Pineda again permitted the Romanian drivers to speak Romanian and permitted the Marieas to translate for the other Romanian drivers.

It is unlawful for an employer to impose more restrictive rules on employees' access to the workplace in response to union activity. *V & B, Inc.*, 322 NLRB 996 (1997), enfd. 132 F.3d 1483 (D.C. Cir. 1997); *Mediplex of Wethersfield*, 320 NLRB 510, 514 (1995). See also *Hickory Creek Nursing Home*, 295 NLRB 1144, 1149 (1989), enfd. 917 F.2d 1304 (6th Cir. 1990) (violation to begin enforcing handbook rule regarding employees' presence before and after shift, in response to union campaign).

In the instant case, Respondent began enforcing its alleged rule on employee access to the facility after union organizing began. Pineda revealed that the purpose for doing so was to limit union propaganda. Further, Pineda and Donlevy made sure to enforce the rule against the leading union adherents. Accordingly, I find that Respondent intended to interfere with union organizing among its employees. Thus, I find that Respondent violated Section 8(a)(1) of the Act.

Similarly, the timing of the rule against speaking Romanian appears to be in response to the union organizing. Further, the rule was apparently aimed against union adherents Daniel and Marin Mariea. No business justification was offered for this rule. Finally, Respondent relaxed the rule after the representation election. Accordingly, I find that Respondent intended to interfere with union organizing among its employees. Thus, I find that Respondent violated Section 8(a)(1) of the Act.

6. The alleged discrimination against Gary Wickey

During the third week of November, Chenoweth told Gary Wickey that Shawn Gutterson, Respondent's vice president, had told Chenoweth to inform the drivers that Respondent would subcontract the driving work to two other companies, before he would let a union come in. Fifteen minutes later, Wickey approached Chenoweth and asked whether Chenoweth had been joking. Chenoweth responded that he had told Wickey exactly what Gutterson had directed him to say. Thereafter, Chenoweth identified Wickey as a "Union guy." Wickey objected and Chenoweth apologized.

In early December Wickey approached Gutterson about wages owed to him by Waste Transport. Gutterson had earlier stated that Respondent would make the drivers whole for wages not paid by Waste Transport. Gutterson said, "I understand you are one of the guys that was involved in starting the Union." Wickey attempted to discuss his wage problem. However, Gutterson asked how "the guys felt about the Union." Wickey responded that he could not speak for anyone else. The conversation then returned to the pay question. During this conversation, Gutterson stated that the subcontractor that hauled recycling for Respondent was interested in getting the work done by the bargaining unit employees.

In early December, after Wickey spoke with Gutterson in an attempt to recover monies owed to him by Waste Transport, Pineda delivered a check to him. According to Wickey, Pineda declared that if Wickey voted against the Union, there would "probably" be more checks for Wickey. Pineda denied making this statement. Also in early December, Pineda told Wickey, "After you get your truck loaded and parked, you have ten minutes to do your paperwork and you've got to be off the property."

On or about December 3, Chenoweth approached Wickey and told him, "I want to tell you I feel real bad the way management is treating you." Wickey said that he felt that he was being singled out. Chenoweth said "I almost quit my job over you." Chenoweth then stated that Respondent's management had gone through Wickey's driving logs in an attempt to find a reason to fire him. That same day, Chenoweth told Wickey that driver Sarey had complained that Wickey had harassed Sarey at

the landfill in Anderson, California. Wickey denied that he had harassed anyone.

On or about December 5, Wickey was called to a meeting with Donlevy, Gutterson, and Hubberman. Wickey asked if he could have a witness other than someone from management. Donlevy denied the request According to Wickey, Hubberman asked why the drivers were unhappy. Wickey asked Hubberman some personal questions. Gutterson asked why the drivers wanted a union and what it would take to make the drivers happy. Donlevy asked what had happened between Wickey and Sarey at the Anderson landfill. Donlevy said that Wickey was accused of threatening Sarey. Wickey admitted having a conversation with Sarey but denied harassing or threatening Sarey. Donlevy said he would have to confirm Wickey's story.

The next day, Pineda invited Wickey back into Donlevy's office. Wickey again requested a witness. Donlevy denied the request. Wickey said that he and Sarey had discussed the matter and agreed that there was no problem. Donlevy responded, "I'm going to make it very clear to you Gary. If there's any physical or verbal problems with Fred, we're going to hold you personally responsible no matter if it happens on or off the property."

Three days later, Wickey was called into a third meeting with Donlevy, Pineda, and Nuno. Wickey again requested a nonmanagement witness. Again, Donlevy denied the request. Donlevy said that Respondent wanted to resolve the situation. Wickey answered that he had already had two meetings and he felt threatened. Nuno then ended the meeting. The harassment allegations were finally cleared a few days later at a meeting, which included Sarey. Sarey told Nuno and Donlevy that Wickey had not threatened him.

Under the Supreme Court's decision in *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), an employee's right to union representation arises "only in situations where the employee requests representation," and is "limited to situations where the employee reasonably believes that the investigation will result in disciplinary action." Id. at 257–258.

Once an employee makes a valid request for union representation, the employer is permitted one of three options: (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice between continuing the interview unaccompanied by a union representative or having no interview at all. *Consolidated Freightways Corp.*, 264 NLRB 541, 542 (1982); *General Motors Co.*, 251 NLRB 607, 608 (1979). Under no circumstances may the employer continue the interview without granting the employee union representation unless the employee voluntarily agrees to remain unrepresented after having been presented by the employer with the choices mentioned in option (3) above, or if the employee is otherwise aware of those choices. *NLRB v. J. Weingarten*, 420 U.S. 251 (1975); *Williams Pipeline Co.*, 315 NLRB 1 (1994).

In *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), enfd. in relevant part 268 F.3d 1095 (D.C. Cir. 2001). The Board held that *Weingarten* rights are applicable in the nonunionized workplace as well as the unionized workplace. The Board reasoned that the Act protects the rights of employees—whether unionized or not—to act in concert for mutual aid or protection. Thus, the right to have a coworker present at the investigatory interview affords unrepresented employees the opportunity to act in concert to prevent a practice of unjust punishment. While an employer is generally free to deal with employees individually in the absence of union representation, an employer may not mask the obstruction of employee efforts to exercise Section 7 rights by asserting a right to deal on an individual basis. *Epilepsy Foundation*, id., citing *Ontario Knife Co. v. NLRB*, 637 F.2d 840, 844–850 (2d Cir. 1980).

In the instant case, Wickey was identified as a union supporter. Before being called into the first meeting with Donlevy, Gutterson, and Hubberman, Wickey had been told that Respondent was looking for a reason to discharge him. Thus, Wickey had a reasonable belief that he was going to be disciplined. After, denying Wickey's request for a witness, Respondent proceeded to interrogate him. The following day, with the question of discipline not yet resolved, Wickey again asked for a witness and his request was denied. Donlevy warned Wickey against harassing Sarey and threatened discipline if anything happened to Sarey. At the third meeting, Wickey again requested a witness. This time, the meeting did not continue after the request for a witness. Thereafter, the question of alleged harassment was resolved.

Under these facts and circumstances, I find that Respondent violated the Act under *Epilepsy Foundation* by denying Wickey's request for a witness at the investigatory meetings.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By denying an employee the right to representation at an interview at which the employee reasonably believed might result in disciplinary action, Respondent violated Section 8(a)(1) of the Act.
4. By interrogating employees about their union activities and the union activities of other employees, Respondent violated Section 8(a)(1) of the Act.
5. By threatening employees with subcontracting, loss of work assignments, and loss of employment, Respondent violated Section 8(a)(1) of the Act.
6. By announcing and granting wage increases and a bonus program, Respondent violated Section 8(a)(1) of the Act.
7. By imposing restrictions on the rights of employees to discuss unions or other protected concerted activities, Respondent violated Section 8(a)(1) of the Act.
8. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended[7]

ORDER

Respondent, BLT Enterprises of Sacramento, Inc., d/b/a Sacramento Recycling and Transfer Station, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activities or the union activities of other employees.

(b) Threatening employees with subcontracting, loss of work assignments and loss of employment, in order to discourage union membership.

(c) Announcing and granting wage increases and a bonus program, in order to discourage union membership.

(d) Imposing restrictions on the rights of employees to discuss unions or other protected concerted activities.

(e) Denying employees the right to representation at an interview under circumstances where the employees reasonably believe that the interview could result in disciplinary action.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Sacramento, California facilities copies, in English, Spanish, and Romanian, of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced, or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the attached notice to all current employees and former employees employed by the Respondent at any time since November 16, 2001.

(b) Within 21 days after service by the Region, file with the Regional Director, a sworn certification of a responsible official on a form provided by the Region attesting to the steps Respondent has taken to comply.

Dated, San Francisco, California, January 31, 2003

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had a chance to give evidence, the National Labor Relations Board has found that we violated Federal Labor Law, and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate employees about their union activities or the union activities of other employees.

WE WILL NOT threaten subcontracting of our trash hauling operation, loss of work assignments, or loss of employment in order to discourage union membership or activities.

WE WILL NOT announce or grant wage increases or a bonus program in order to discourage union membership.

WE WILL NOT impose unlawful restrictions on the rights of employees to discuss unions or other protected concerted activities.

WE WILL NOT deny employees the right to representation at interviews under circumstances where the employees reasonably believe that an interview could result in disciplinary action.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

BLT ENTERPRISES OF SACRAMENTO, INC., D/B/A
SACRAMENTO RECYCLING AND TRANSFER STATION

[7] All motions inconsistent with this recommended Order are hereby denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."